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BEFORE THE

SENATE INDIAN AFFAIRS COMMITTEE

HEARING ON S. 2097

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Introduction

Good morning, Mr. Chairman and members of the committee. My name is Tim Columbus. I am a member of the Washington, D.C. law firm of Collier, Shannon, Rill & Scott. I am appearing this morning on behalf of our clients, the National Association of Convenience Stores ("NACS") and the Society of Independent Gasoline Marketers of America ("SIGMA"). Thank you for inviting NACS and SIGMA to appear before the Committee to express our views on S. 2097, the "Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998."

NACS is a trade association of over 2,300 companies that operate over 60,000 convenience stores nationwide with some 750,000 employees. Over 75 percent of NACS member companies are classified as small businesses. NACS member companies collectively sell over 55 percent of all gasoline and approximately 50 percent of all tobacco products sold at retail in the United States every year.

SIGMA is an association of over 260 independent gasoline marketers operating in all 50 states. Last year, SIGMA members sold over 30 billion gallons of motor fuel, representing over 21 percent of all motor fuels sold in the United States in 1997. SIGMA members supply over 28,000 retail outlets across the nation and employ over 200,000 workers nationwide.

NACS and SIGMA would like to thank the Committee for holding this hearing today and thank the chairman, Senator Campbell, for introducing S. 2097. The fact that Senator Campbell introduced S. 2097 indicates to us that he acknowledges that a problem exists in the area of state excise and sales tax evasion by Native American tribes and that this problem should be addressed by Congress. While NACS and SIGMA may disagree with Senator Campbell on the precise methods of addressing this problem, we believe we share common ground on the problem's existence.

Witnesses representing NACS and SIGMA appeared before this Committee in March and testified on the issue of Native American state excise and sales tax evasion. At that hearing, undisputed evidence of Native American state excise and sales tax evasion was presented to this Committee. S. 2097 may have been introduced, at least in part, in response to the testimony this Committee heard at that hearing. NACS and SIGMA welcome Senator Campbell's active participation in the process to address this growing problem. However, we are not convinced that S. 2097 is the appropriate solution.

A Dispute Resolution Panel Is Redundant And Unnecessary

This is true for several reasons. First, S. 2097 would set up an "Intergovernmental Alternative Dispute Resolution Panel" to consider and render a decision on a dispute between a state and a Native American tribe on, among other issues, the application of state excise and sales taxes on purchases by non-Native Americans of retail goods, such as gasoline and cigarettes, from a Native American retailer. The establishment of this panel through Section 103 of S. 2097 implies that the existing avenues of dispute resolution open to tribes and states are inadequate or in some way flawed. NACS and SIGMA find this implication erroneous.

The existing law on the issue of state/tribal disputes in the area of the imposition of state tobacco and motor fuels excise and sales taxes, as established by the United States Supreme Court, is clear. The Court has stated that such state taxes cannot be imposed by the state on tribes or their members. The Court also has stated that when the incidence of such state taxes is on a non-Native American, the tribe and its members have a duty to assist the state in collecting and remitting those non-discriminatory state taxes when a non-Native American purchases gasoline or cigarettes from a Native American truck stop or smoke shop.

Thus, the need for a new dispute resolution panel would be redundant with the role of the existing federal court system. The law in this area is not in dispute: if the incidence of the tax is on a non-Native American, then the state has a right to the revenues and the tribe has a duty to assist the state in collecting these revenues, just as all non-tribal motor fuels and tobacco retailers have such a duty. Instead of setting up a redundant alternative panel to the federal court system to adjudicate these disputes, NACS and SIGMA urge this Committee to explicitly vest federal courts with the authority to resolve these disputes and enforce their decisions. Any other action carries with it the implication that the federal courts cannot be trusted to dispense fair and impartial justice either to the state or to the tribe -- an implication that NACS and SIGMA do not support.

Counterclaims, Setoff, Or Related Claims

Second, Section 103(d) of S. 2097 would require an alternative dispute resolution panel to consider any "counterclaims, setoff, or related claims" raised by a tribe in a dispute with a state over issues of state taxation. This subsection both ignores the Supreme Court's decisions on state/tribal tax disputes and potentially opens up the issues to be considered by the panel to any grievance or argument a tribe chooses to bring before the proposed panels. In the area of tax disputes, the Supreme Court decisions regarding state/tribal tax disputes do not mention the issue of setoff or related claims. Of course, if a tribe is sued by a state for the collection of state excise or sales taxes,

the tribe may bring a counterclaim against the state as part of the same lawsuit for legitimate, related claims against the state..

Section 103(c) also gives no guidance to the proposed panel regarding the weight or attention it should give to such tribal counterclaims. Theoretically, under the language of this subsection, the panel would be required to give equal weight to the most absurd or tangential tribal counterclaim. Even more, the failure of a panel to adequately consider every and all tribal counterclaims -- no matter how unrelated to the underlying dispute -- could give rise to a tribal challenge of the panel's processes and decisions.

Panels Would Be Mired In Politics

Third, Section 103(d) of S. 2097 provides that the proposed panel be comprised of five members, including three executive branch representatives. While this composition may be attractive to tribes under the current Administration, which tends to be sympathetic to many Native American issues, this situation could be reversed in the future under other Administrations of either party. In short, a panel composition that may be sympathetic to Native American claims in 1998 may turn hostile to these claims in 2002, leading to conflicting and/or contradictory panel decisions and inconsistent justice.

This potential political whipsaw also would undermine the authority of the proposed panel and weaken the faith of all potential parties to a dispute that they would get a fair hearing and a just decision from the panel. This potential underscores the redundant nature of such a panel. The federal judiciary was established to render impartial and unbiased decisions on matters such as intergovernmental disputes. The drafters of the Constitution established an independent judicial branch to avoid exactly the type of political influence to which these proposed panels will be subject.

Panel Decisions Lack Enforcement Authority

Fourth, nowhere in S. 2097 is there an indication of how, if at all, the decisions of the proposed panel would be enforced against a party to a dispute. Section 104 of the bill expressly authorizes federal district court jurisdiction for civil actions for parties to a state/tribal agreement or compact. However, it is silent on the issue of the enforcement of a decision of the proposed intergovernmental dispute resolution panel. For example, assume that a state brings a claim against a tribe for failure to collect and remit a lawfully-imposed, non-discriminatory state excise tax on cigarettes. After hearing the dispute, the panel finds that the state's claim is justified and orders the tribe to begin collecting and remitting the appropriate tax to the state.

There is no mechanism available to the state under S. 2097 to enforce the panel's decision against the tribe. Instead, the state would be faced with the same judicial remedies that are available to it now. And the tribe would be successful in defeating any lawsuit to enforce the panel's decision by asserting a defense of tribal immunity. Thus, under S. 2097 and the proposed dispute resolution panels, nothing is really resolved.

Support For Certain Ideas In S. 2097

NACS and SIGMA do support several of the concepts included in S. 2097. First, the active involvement of the Department of the Interior in convening non-binding mediation between a state and a tribe involved in a tax dispute is an important initiative that should be pursued. However, we are concerned that such mediation take place within the parameters of the Supreme Court's decisions on this subject and that Interior participants be familiar with, and bound by, these decisions.

In addition, we are concerned that the timetable for such mediation outlined in Section 102 of S. 2097 may prove too cumbersome both for states and for tribes. If the issues addressed in the mediation are confined to whether the state tax at issue is a lawful, non-discriminatory tax for which the incidence is on a non-Native American and whether the tribe has a duty to act as an agent of the state in collecting and remitting the tax, then the elongated timetable should be unnecessary.

Second, NACS and SIGMA are intrigued that Section 104 of the bill would require states and tribes to include a provision in any agreement or compact reached under Section 102 waiving both the state's and the tribe's sovereign immunity in order to enforce the provisions of the compact or agreement in federal district court. To date, Native American tribes have been unwilling under any circumstances to waive any portion of their tribal immunity to permit state enforcement of lawful state taxes. And yet, under Section 104, tribes would be required to waive their tribal immunity to the extent necessary to enforce a compact or agreement as part of any state/tribal agreement. If the tribes are willing to support legislation that would require them to waive a portion of their tribal immunity, then perhaps there are other circumstances in which the Congress could restrict tribal immunity without eviscerating the entire concept of tribal immunity -- a result some tribes have predicted from such a restriction in the past.

NACS and SIGMA Support The "State Excise, Sales, and Transaction Tax Enforcement Act of 1998"

Senator Slade Gorton recently introduced the "State Excise, Sales, and Transaction Tax Enforcement Act of 1998." NACS and SIGMA strongly support this legislation for many of the reasons that we have criticized S. 2097.

First, this legislation closely tracks the relevant Supreme Court opinions by stating affirmatively in federal law that tribes and their members are required to: (1) act as agents of the state when selling tobacco products and motor fuels to non-Native Americans; and, (2) collect and remit to the appropriate state lawfully-imposed state excise, sales, and transaction taxes on such sales to non-Native Americans. Second, in the event there is a dispute as to whether the state tax at issue is lawful, this legislation provides that a state may seek a declaratory judgment on this issue from an impartial federal district court. Third, if the appropriate federal district court decides that the tax is lawful, then the state is authorized under this legislation to bring an action against a tribe in federal district court to enforce the tribes' duty to collect and remit that tax to the state. Fourth, to the extent necessary to enforce this duty, tribal immunity is waived.

In addition, Senator Gorton's bill does not disturb any existing state law or state/tribal compacts or agreements that exempts a tribe from collecting and remitting state excise, sales, or transaction taxes. Thus, if a state has an existing compact with a tribe that exempts the tribe from

its duty to act as an agent of the state, or if existing state law exempts the tribe from such a duty, then the legislation would not apply.

Senator Gorton's bill represents a more comprehensive and logical solution to the issue of state/tribal disputes over tax issues than S. 2097 for several reasons. First, it limits its application to lawful state taxes under which the incidence of the tax is on non-Native Americans only. Second, it respects existing state compacts and law. Third, it places enforcement authority in the hands of the impartial federal judicial system, not in the hands of a potentially politically-influenced panel. Fourth, as with S. 2097, it limits tribal sovereignty only to the extent necessary to enforce lawful, non-discriminatory state excise, sales, and transaction taxes.

Conclusion

NACS and SIGMA are heartened by the introduction of S. 2097 and by the fact that our requests for congressional assistance in resolving the issue of Native American state excise tax evasion are being actively considered by this Committee and others in Congress. However, NACS and SIGMA will lend their strong support to Senator Gorton's legislation because it promises to provide more effective, comprehensive, and rapid relief to our members. We have attempted to be constructive in our criticism of S. 2097, and hope that our testimony has been taken in that light.

Thank you for this opportunity to testify, Mr. Chairman. I would be pleased to answer any questions you or your colleagues may have.